

*Basit Kestyns*

A Briefe  
**DECLARATION**  
FOR  
What manner of speciall Nusance  
concerning private dwelling Houses,  
a man may have his remedy by Assise,  
or other Action as the Case  
requires.

Vnfolded in the Arguments , and  
opinions of fourre famous Sages of the Com-  
mon Law; together with the power, and extent of  
customes in Cities, Townes, and Corporations, con-  
cerning the same : together with the determi-  
nation of the Law, concerning the commodity, and  
use of Houses, and their appurtenances.

Whereunto is added,

*Basit Kestyns*

The Iustices of Assise their opinion, concerning statute  
Law for Parishes ; and the power of Iustices of Peace,  
Churchwardens, and Constables : and to know what they  
are to do concerning Bastards borne in their Pa-  
rishes, relife of the Poore, and providing for poore  
children: what remedy for the same.

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The Arguments and opinions offoure famous Sag-  
ges of the Common Law, touching the power, and  
extent of customes of Cities, Townes, Corporati-  
ons, and Inheritances, together with the deter-  
mination of the Law concerning the commodity,  
and use of Houses with their appurtenances, and  
wherein an action may be maintaineable concer-  
ning the same, and wherein not.



Man hath a House, and the Mr. Mowbray's argument.  
Windows thereof open into another mans house, whether hee may bulde a house, so as to stop up the same lights, or not: concerning which, I purpose to shew you my opinion, and likewise to shew unto you the necessity and use of Houses.

The first, and chiefe use of an house is to defend man from the extremity of the winde, and weather. And by the receipt of comfortable light, and wholesome aire, into the same to preserve mans body in health.

Therefore whoso taketh from man so great a commodity, as that which preserveth mans health in his castle, or house, doth in a manner

manner as great wrong as if he defised him altogether of his Free-hold.

As if I have a Mill, and another will turne away the water running to the same, I may bring an Assise against him.

So, if I have a Pipe, which conveyeth water unto my house through the ground of another man, and he will cut my pipe, I shall have an action against him : In like manner who so stoppeth my light, is the cause that no ayre can enter into my house, without which no man can live, and a house lacking light, is rather a dungeon then a house.

If one who hath a horrible sicknesse be in my house, and will not depart, an action will lye against him, and yet he taketh not any ayre from me, but infecteth that which I have.

So if one cast filth neere unto my house, I may bring my action against him. If a man build so high that his house droppeth on my house, I shall have remedy against him.

And though light and ayre be common, yet if by any mans owne act they may bee made private, they may not then bee taken from him, and if they be, hee shall not be without remedy.

This appeareth by Hawkes, and Deere, which *be sera natura*, yet if by mans industry they are made tame, the owner will thereby gaine property in them : but peradventure it will bee said, *The foyle is his owne, and it is Damnum absq;*

*absq; injuria, what then? though it be his owne,  
he must so use it, that hee hurt not his Neigh-  
bour.*

As if a man had a Pond of water, and will  
suffer it to drowne his neighbours land, he shall  
have remedy against him.

If a man bee bound to repaire the bankes of  
the sea that it drowne not the land adjoyning,  
and so doth not, but the land is drowned; an  
action lyeth against him. You may perhaps say  
there is plenty of light remayning, this not-  
withstanding our action will lye very well, for  
the taking away, or impayring part thereof. As  
an action was brought *quare arctavit, &c 2. H. 4.*  
where a man had a way and another plowed the  
same, and it was thought there that an action  
would very wel lye, and yet the way remained.  
If I have common in your Land, and you will  
plough part of the same Land, I shall very well  
maintaine an action against you. So it is of  
Common of Estovers, and piscary: and yet  
in all these cases, the whole is not gone, but  
some part remaineth. This proveth that though  
hee hath not stopped the whole light of the  
house, yet for that he hath stopped parcell, an  
action is very well maintainable, but if you had  
said, that on the same side there had bee ne plen-  
ty of light, it might have better stood with  
reason.

As touching your custome, whereby a man  
may stoppe his neighbours lights: I think this

is rather *malus usus*, then any custome : for as I have learned of Mr. Hales, a custome is thus defined, *Consuetudo est ius non scriptum nunquam repugnans rationi naturali*, and therefore if any custome swerve from reason, and naturall equity, it is but *malus usus*, and for that to be abolished, for by entendment, and consideration of the law, and reason, every custome had a reasonable beginning, as that case in 35.H.6. of selling Jewels in Cheapeside may have a reasonable beginning. In like manner the custome of *Gavelkind*, that Sons shall equally inherit the Lands of their Fathers. Such is the custome, that if a woman marry without licence, that she shall loose her dowry.

So is it also of the custome that one Towne may enter common with another. All these, and such like may well bee thought to have a reasonable beginning.

Otherwise it is, where by intendment their beginning cannot be thought reasonable.

As that a man shall pay relief, when that he shall marry his daughter. And as the custome is in Mich. 35.H.6. fol. 31. of the pledging of goods : So it is of the custome, to arrest a man before the day of payment. In like sort in 2. H.4. that the tenant shall not put his beasts into the Common, before the Lord hath put in his, which peradventure he will never doe. so it is 10.H.6., If the Major of a Towne will prescribe to impound all beasts which shall be damagec

dammage lesonet in his owne pound, and therē  
to keepe them till he be satisfied as he list, or if  
he prescribe to use, and occupy the same beasts  
howsoever he pleaseth.

In 2. R. 3. and 22. E. 4. one demanded whe-  
ther it were a good custome, that if the Mayor  
of a towne suspect a man, that he may arrest  
and imprison him 3. dayes : this was thought  
no good custome, but to be most abhorring, and  
dissonant from reason. And therefore foras-  
much as houses be necessary, and cannot bee  
without light and ayre, their beginning was  
lawfull, necessary, and reasonable, but that a  
man might stoppe up his neighbours lights, was  
never necessary, neyther had lawfull, or rea-  
sonable beginning, neyther had any time obtai-  
ned the force of a law, or custome, for in K. Hm.  
the 2. his time, it was but a constitution in Lon-  
don, and not any custome, and law, & therefore  
never allowed or confirmed in Parliament, for  
*Magna Charta C. 9.* did confirme such old li-  
berties and customes as London had at that  
time: And therefore, if this were not any law  
or custome at the time of the making of that  
statute, it neither was nor could be confirmed  
by the same, for the more generall Statutes shall  
have a reasonable construction. As the Statute  
that doth prohibite maintenance, shall have a  
construction, for lawfull maintenance is not  
thereby prohibited. The like law is that where  
it is said, that a fine shall bee a Barre to a fine  
couerte,

reverse; this is to be understood of a good, and lawfull fine, so this confirmation by Parliament of customes, and liberties of London, shall bee intended a confirmation of all their good, and lawfull customes, and not of unreasonable, or wrongfull usage, such as in 27. H. 6. if the house of tenant for terme of yeeres decay, that then he shall pay no rent, &c. But if your custome were then good, and so confirmed by Parliament, yet the words thereof may not be stretched to our case, the words are *visus fene-*  
*strarum*, and the Civill Law saith, a man may estop *visum*, & not *lumen*, *lumen est descendens de*  
*celo, visus est meus prospectus ad terram.*

And our Law saith, *petit visum terre*, and *visus* and *lumen* differ. But Sir you cannot in this case defend your selfe both by the Common law and custome too. For you ought absolutely to trust to the one of them, and if you had plead thus by way of Bar, your plea without all doubt would have beeene double.

As if a man will pleade affeafement with warrenty, and rely not on the warrenty, this plea is double. So in the case at the Barre, you plead both the common Law, and the custome, and your plea is double, and therefore for all these causes I thinke the plaintiff ought to recover.

Mr. Plowden,

Mr. Plow-  
dens argu-  
ment.

Albeit it hath beeene alledged, that the win-  
dowes

dowes have beeene time out of memory there, and the lights ancient, it is all one, as if the house had beeene built at this day. But the case there is a pale betwixt your ground and mine, and you build to the uttermost part of mine, by your first building I am bridled and stopt of my building; And in the Country who so maketh a hedge, will make a dike in the uttermost part upon his owne land. So hee that maketh a Parke, will leave ground out of the same compasse without the pale for the Keeper to walke about it, for there he may better heare if any body bee there within, then if he were within himselfe, And this is called free-bownd. If a man build his house so hight that it droppeth on mine, an action will very well lye, for there is a manifest hurt, and wrong done unto me: but 22. H.6. where the Prior of St. Edes had three Mills, and other man built another by them, he could not have any remedy for this. But if any of his tenants which held of him by grinding at his Mill grinde at the new Mill, the Prior may have an action against him, for he whose the land is, might use the same for his greatest commodity, and gaine.

If a man cut downe Trees which fall upon an other mans land, he shall have his action; otherwise it is, if a Tree fall by reason of wind. So in our case: of our owne soyle we may make the best, as in 12. H.8. a man had a poade, and let the same runne out, whereby the next dwellers

land was drowned, this was but *damnum absq[ue] injuria*, wherefore no action would lie. In 4. E. 3 a man had a Lime-kilne, which destroyed the fruit of his neighbour, who maintained his action, for in that case this taketh place, *Sic utero iug[um], si alienum non ledas*; And Mr. Rastall saith in his booke, if a man have a Dye-house, and the water which runneth to his house, killeth the fish of another, an action lyeth. If a man cast filth under my walls, I may punish him for it. And in the 46. E. 3. The Prior of Buckhurst had a sluice, whereby Salmones came in, and one stopped the same, wherefore he had his action. Like whereas one cutteth away the water, which runneth to my mill, for the proofe whereof Mr. Raynolds put a case out of 19. E. 3. where an Assise was brought for two things, one because he had levied a house to stoppe the light; an other, because he could not repaire the same: There it was thought that no action would lye, because he might have remedied this in the beginning when he built his house. And the case was in 7. Edw. 3. in the last point, and there the Lawyer sayd, that hee might have left space enough in his owne Land, and the party was non-suted. *Hornwoods report* hath two verses,

*qui be ait auidi Hafli ad abraham et omnes  
uba Sepe recordare si debes adificare  
omniu[m] Vt poteris stare cum eam vis reparare.  
et ob hoc hinc quod habet in a. 8. Et 11. et 12. et 13. et  
2. But you ayde your selfe with a prescription  
that*

that you have had light time out of minde; this  
is no good prescription, for a prescription must  
be against some party. But this is against God;  
You say further, that the other had no house,  
which is not good; for a prescription must be in  
the affirmative, and this is in the negative, and so  
sayth *Prisot* in 22. H.6. that a man cannot pre-  
scribe in the not having a house. But admitting  
it to be the usage.

An usage is generall, and a constitution speci-  
al in 12. E.4. A diversity is taken betweene u-  
se, and custome, for that a custome is a thing  
disagreing from the Common law, but not  
contrary, and also it would not be beautifull that  
Cities should have any voyd places in them, and  
it would be most honourable that they should  
be populous. And therefore was there a Statute  
made 27. H.8. c4. *prima*, that there should not be  
any voyd places in diverse Cities, also houses  
are necessary for the sustenance of man. in 12.  
E.4. there is a custome that if a man plough his  
Land, he might turne his plough upon another  
mans land: and this was thought a good cu-  
stome for the favour of Tillage, much more our  
case of Building is to be favoured. 8. E.4. the  
custome is, that a Fish-man may drive stakes in-  
to another mans ground to dry his Nets, which  
was allowed for a very good custome. Like-  
wise 15. E.2. one prescribed that when the Hay  
was carried out of a certaine meadow, that hee  
should occupie the land vntill our *Lady* day,  
which was allowed by the Court. So a man

may prescribe to have Common of ellowers in another mans land, and to cut them down himselfe. The Lord in ancient demesme prescribed, that if the vallaine of another Lord remained a yeere and a day in ancient demesme, that then it shall not be lawfull for his Lord to take him from thence. In like maner, one may prescribe to have gravell in my Land, and all these customes stand very well with reasoun. If I have a way, and another man plow up the same, I cannot have an action on my case, but I must have a writ of *Affise* and so is the booke in 2. H. 4. M. Fleetwood saith that all customes must stand with reason. And in 5. E. 4. it is sayd, that albeit all customes are confirmed, yet they must be examined, by the rule of reason, as the custome of *Gavelkind* standeth with reason. The Statute that giveth a writ of ravishment *de Gurd to Guarden* in soccage shall be extended to the Mayor, and Aldermen of *London*, to give them like remedy which was confirmed by 1. E. 3. Also the Statute that no man shall give lands in Mortmaine, yet Citizens and Breemen of *London* may give lands in Mortmaine by their custom, which custome is also confirmed by act of Parliament. As for the doublenesse of the plea I will not say any thing, for that it is not any justification, but onely for to diminish the damages, if perhaps it bee found against us. And therefore upon the whole matter, I thinke the plaintiffe ought not to recover in this action. I thinke the contrary, and first I will consider these four things.

First,

First, whether such buildings, ex opposita, bee  
nuisance by the Common law. & H. 6. may no  
Argument.

Secondly, whether this custome bee a good  
custome.

Thirdly, whether such kinde of buildings be  
for the beautifying of the City.

Fourthly, whether the said confirmation by  
Parliament make this custome good, or not.

As touching the first matter, the nuisance  
which is supposed to bee in stopping up of win-  
dowes in the South part of an house, I conceive  
is a nuisance by the Common law, for by the  
Common law, one shall not hurt the Freehold  
of another, and no greater hurt, grievance, or  
damage can bee done to any mans Freehold,  
than to take away the light and ayre thereof  
which is comfortable, & commodious for him;  
for when this light, and ayre are taken from  
him, his house remaineth as a dungeon. And  
diverse cases there bee where a man taketh a-  
way from another not the thing it selfe, but  
the commodity of the thing, and for that  
he shall have his remedy by action: as if I have  
a water running through your ground unto my  
Mill, and you will turne away the course there-  
of, or stoppe the same; I may being an assise of  
E. 3. p. 4. a 9. yea I will boonefesse right, if an other  
build a Mill by my stabbly, I may not have any  
action, as a. H. 6. for it is damnum absque injuria.  
So it is in a. H. 4. in the case of the Schoole  
standers again. But if I say ought to grind at my  
mill,

(11)

Mill, and another will hinder them; an action lyeth, 9.H.6. fol. 145, where the Prior of St. Bar<sup>t</sup>s had a Faire, and one interrupted the commers thereto, whereby his Toll was impai-  
red, and yet not his Faire, but the profit of his Fayre taken away, and he had redēmyd. So in our case he hath not medled with our Freehold, and yet hee hath hurt our Freehold. So in 4.  
E. 2. 13 E. 3. If I have a Faire, and the King will grant another, if my Fayre bee impaired by this I shall have an action, and so of a Ferry, and the reason is, because a man is compellable to maintaine his Fayre, Ferry, or market, and if hee doe not, it is punishable in a Leete. But of a Schoole, otherwise it is, for that a man is not bound to maintaine it, but Houses and Cities men are bound to maintaine, and that by Statute, otherwise they may incurre the punishment. 18 E. 3. one built his house so high over mine, that the raine dropped from his upon mine, and it was thought there that an action was maintainable; yet that hurt might have beene amended to sayys in our case where the hurt is perpetuall, and cannot be amended. And if for a way an action lyeth, as it is in the 12 E. 3 much more for a hurt greate than which aboue all things had bin had regard unto, for the p[ro]fess, whereof we haue written the Register de leprosy in our land. Likewise the selling of con-  
spicuous robes, wherby mens bodies may sustaine harmes, is punishable in a Leete, which preveneth  
him that

that the Common law bath regard unto the health, and welfare of every private man. There is a case in 4. El. 3. lib. ass. pts. 3. where one built a Lime kilne, and his neighbour was annoyed by the smoke thereof, and had his remedy. If a man shall be punished for smoke, which may be avoyded, and dureth but at times, what shal we thinke of the taking away of light, and ayre, which cannot be amended, but remaineth a continuall and perpetuall nusance? as for the cases in 19. E. 3. which hath bin avouched so ofte to make strongly against us, I take them to be one case, for so much as the iustices which speake in one place, speake also in the other place, and last of all in both cases, the case was thus; an affise of nusance was brought, and the Plaintiff couerted how the Defendant had levied a house, so that thereby his light was stopped up, and that he could not so well come to his house as he did before, also that he could not repaire his house so well as he could before.

Here be said, as to the light be it a nusance, such a one as it is *Tiel. que.* for the repairing none, for when a man buildeth, hee must leave so much space on his owne ground that hee may come to repaire his house, and if he had thought that stopping of his light had bin no nusance he wold not have said, be it a nusance *Tiel. que.* but have said as he did to the other case of repayring, it is no nusance. And therefore for the first matter, I thinke this to be a nusance by the Common law.

As

As touching the second matter, whether this custome be a good custome or not, and I thinke the same is no good custome : For *consuetudo est in. &c. ut supra*, a custome is not against law, and reason, but this custome of yours is against reason, and is in effect, as if a man should take my life from me, for these bee the instruments to maintaine, and preserve mans life, and the law faith, *sic ueret uo. ut alienum non ledas*, therefore a custome against this precept, is *malus usus*, and therefore *ab aliendas*, as the case in 21. E. 4. If the Kings Bayliffe or any other Bayliffe distaine Cattell, and bring them to the Lords Pound, and if the owner did not within three dayes agree with the Lord, that then he should loose his Cattell, this wasthought unreasonable and not allowed for any good custome. So in 9. H. 6. where there the Lord of a Leet would have prescribed to have all the waste ground, but he could not, because it was against reason, that he who had nothing in the land should have the wafts. Like unto the said case in the 35. H. 6 fo. 31. of pledging of goods and such is that case in 43. E. 3. where the Lord of the Maner would have prescribed, that none of his tenants should marry their daughters without his licence; this custome was thought to bee against all equity, and reason. In 13. E. 3. in a *dumfuit infra etatem*, one would have prescribed, that if the Plaintiff could number 12d. he might alien his land by the custome : this is not a reasonable custome, for

for a man may be able to number 12d. and yet  
not have discretion enough to alien his Land:  
So it is likewise against naturall reason, that one  
should barre me of my light, and ayre, without  
which I cannot live, and therefore these things  
be of necessity. Also it is against the Law that  
one should meddle with the Freehold of ano-  
ther man, unless it be for a Common-wealthe,  
as 8. E.4. where one justified the setting in of  
stakes for to dry his nets, and likewise in the  
11. H.2. where one brought an action for taking  
or driving his Hogges, the Defendant justified,  
because the custome of the City was, that if  
any mans Hogges came into the City, and upon  
warning given to the owners to keepe them  
out; if they came againe, that then they shall be  
forfeited. This is a reasonable custome, be-  
cause Swine are beasts that may cause diseases to  
bee in a City, and therefore it is against the  
Common-wealthe, in 22.E.4. Where it is sayd,  
that a man may turne his plow upon another  
mans land, that is a good custome, for by this  
meanes no land shall be unsowne, which is for  
the maintenance of Tillage, and the benefit of  
the Common wealth. But this your custome  
is but a private custome, and not for the main-  
taine of the Common-wealthe, and therefore is  
like unto the custome in 43.E.3. that if the te-  
nant cease to doe his custome, the Lord may  
enter, this custome standeth not with the Com-  
mon law, neither with the Statute which per-

leth the Lord to his *cessavis*, and giveth him not any entry. So it is to be thought of the custome in 2.H. 4. that the Tenants shall not put their beasts into the Common before the Lord hath put in his, which peradventure he will never do, so that the Tenants shall never have their Common. So it is if a man prescribe that the alienation of the Husband of the Lands of his Wife shall bee good without examination of her. Like law of the custome in 43. E. 3. that if any goods be wayned in any manner, and if any man take them, that then it shall bee lawfull for mee to distraine, and detaine the distresse untill such time as I am satisfied: by these cases rehearsed it is manifest and cleare, that all usages against naturall reason, and the Common law of this Realme, are not customes, but evill usages, and not to be allowed. So in our case a custome to take away a mans light, and ayre, preservers of health, must needs bee *malus usus*, and therefore ought to bee taken away; For good usages stand with reason, and as *Brazen* faith, must give place to reason and law. But you will say, that the law of your City is such: I say if it stand not with reason and law, it shall not bee allowed. As 10 E. 3. in an appeal brought by a Citizen, the Defendant waged battaile, this Citizen said the custome of London is such, that a stranger should not wage battaile against a Citizen, this was thought no good custome, nor sufficient to deprive a man  
of

of a benefit, which the law giveth him. And so  
in 27.H.6. in an action of debt upon a lease for  
yeeres, the defendant sayd that the custome  
was, that the plaintiff should repayre the hou-  
ses, and if not, that the defendant should pay  
no rent, this was thought to bee no custome  
allowable. For the third point, this is no beauti-  
fying at all to the City. In our case Mr. Hayles his  
houle is an ancient house, and therefore a-  
gainst reason that by later building, the com-  
modity, and use of the same should bee taken  
away. You say also that it is a thing honourable  
to have buildings in Cities; This I grant, and  
I thinke no man will deny it: but by building  
of one, to impaire a better house, this is not  
any beautifying, or honour at all to a City, but  
rather the contrary. For the fourth matter, if  
the custome be not good, the confirmation can-  
not make it good: for as I take the law, the  
common learning is, that a confirmation cannot  
make a voyd thing good: as for a confirmation  
*est firmum facere id quod non firmum fuit ante, sed*  
*fuit tamen,* 26.H.8. If an Infant grant an advous-  
on, and at his full age confirmeth the same, by  
this confirmation nothing is wrought. So it is  
in the case of 33.E.3. where the lease for yeares  
was made by a Bishop, and he dyed before the  
yeeres expired, the successour confirmeth the  
said lease, and *nihil operatur*. Likewise in 39.H.  
6. the King granted an advouson to one, and  
after granted the Mannor with the advouson to

another; and after the confirmation is made, yet the advouson passeth not. But where the Statute limiteth that men may devise unto corporations in Mortmaine, yet if they will devise to any that is not a Corporation, it is without warrant: And also albeit a man may not wage his law in London, yet if at the Common law, an action be brought against him, he may: So it is of the case in 20. H. 6. that if one be brought before the Sheriff, that the Mayor may dismisse him, yet after judgement hee may not dismisse him.

Likewise 12. E. 4. where one would have prescribed to buy things without payng of tolle, that he could not be allowed. And therefore I will conclude that such customes as stand with law, and reason, are to be allowed, and contrary such as swerve from the rules of law, and reason, to be disallowed. As this custome of yours, that a man should stop his neighbours lights is altogether unlawfull, and unreasonable, and therefore the plaintiff ought not thereby to be barred of his action.

Mr. Manwood.

Mr. Mar- Here bee two matters chieflie to bee consider-  
woods Ar- ed, whether by the Common law this bee a  
gument. infance, to stop up part of a mans light, then  
if the Common law seeme to be doubtful, whe-  
ther the custome will helpe us, or not, divers  
cases

cases have beenē put, when a man touchest not the Free-hold of another, but on his owne land doth wrong unto another mans. But all these cases doe vary from our case, for they are where a man hath a private profit in a thing, and another by doing an act upon his owne land taketh away the same, wherfore an action will lie, as the case in 46. Edw. 3. where the Abbot of Buckhurst had Salmons, comming in at a fluice from the Sea, and a stranger stopped the same, so that they could not come, and hee had his action. So it is where one taketh away my way, because this is a thing locall. And so if water running to my Mill, if one misfearly the same : generally wheresoever I have a private profit, or interrest, and one barre me of the same, it is injury : but the ayre is not any element locall, neyther may any man miscarry it, for it suffreth nothing to be voyd, also light, and ayre bee not shirgs of necessity, but of pleasure, and bee not any profit in *certe loco*, and therefore not like unto other cases of things both profitable, and also necessary. The case of the Ferry I will grant, that if I have a Ferry to transpot men, and another will erect another I shall have an action, because that I am compellable to maintaine it, and the not keeping of it, dispresentable in a Leete. The same law is of the Market, where the King granteth another Market ad *documentum* of mine, I may have a *Scire facias* to repeale his letters patents if he have these words ad.

in them, that the grant should not bee to the hurt, or prejudice of any other market; and if not, I shall have an action on my case: your case was also compared to the case in 4. E. 3. and 4. aff. pl. 3. where the *aff.* was maintained, not for that the plaintiff was annoyed by the smell of the smoke, but because his Apple-trees, and other his fruits were destroyed by the same, & this is a good reason, for that it is to his disinheritance. As for the case of the Lime-house at Ratcliffe, and the smoke of Smiths houses which cast many unsavory smels, it is *dignum absq; injuria*. And I my selfe was by a Smith annoyed by the smell of his smoke, but yet might I not have any action against him. In 18. Edw. 3. one built an house so high that it dropped from his to mine, in this case an action will lye, for my tyles are thereby consumed, *gutta cavat lapidem*. So of the case in 2. H. 5. if by common assent our houses joyn, and a gutter is made betwixt us, if I plucke up my part, you may maintaine an action against mee. All these cases hitherto put, have beeene of taking away a local commodity, or else of consuming something.

The case of the filth I finde not in my booke, but in the booke of Entries, and there it was *20 paces*, so that the walls were hurt thereby. But I will agree with you, that if all your windowes were stopped, that an action will lie, and where you say, *se nesciatne ut alienum nos habet*,

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this is not meant of things of pleasure, but of things of profit. And here is not any part of your house consumed, but herein a let of your pleasure onely, for which your action is not maintainable. And if I have a Windmill, and another will build another by mine. I cannot have any action against him. 11.H. 4. 7.E.3.  
 22.H.6. But otherwise it is of a Watermilne,  
 9.affisar.pla.19. where one had a Watermill, and another built neere unto him, so that hee could not grinde so much as he was wont, in this case a man may very well maintaine his action. If I have an Inne, and another set another in the same Towne, hee is not punishable, but if hee will stop my guesse, which come to my house, I shall have remedy. If I have a Brew-house, and another build another by mine, I shall have no action. 12. H.8. If water fall on my land, and I make a Sluice, and let it out of my land unto another mans; this is dispuishable, for every man may doe this one after another untill it come unto the River, but if it be a river, otherwise it is; For there it is in *loco certo*. If one house should not bee adjoyning unto another, it would bee a great deformity, and if *Cheapside* were so built, it would be a strange *Cheapside*. And the Civill lawes say, that two lights on the former part, and backe of an house, are sufficient. And if you make your windowes into our garden, this is a wrong done unto us, for by this meanes I cannot talke with my friends.

i amy Garden but your servante may see what I  
 doe, and so the wrong first begun in Mr. Hales.  
 And therefore *Vim vi repellere licet.* And I.S.  
 hath not consumed, or hurt any part of his  
 house, but interrupted him of his pleasure only.  
 But I further affirme, that for every hurt a man  
 may not have an action, but if a man bee often-  
 times hurt, he may very well have an action: As  
 if the Lord distrainteth for rent, an action lyeth  
 not; but if he distrainteth oft, that I cannot plow  
 my land, I shall have an assise. So the Kings  
 grant of exemption to one is good, but if it be to  
 diverse, it is not good: But if the Common law  
 would not helpe us, yet custome will, & where-  
 as it hath beeac sayd, that it is against naturall  
 reason, and law, it is not so, *Consuetudo ex ratio-*  
*nabili causa privat communem legem;* and unless  
 it do *privare communem legem,* it is no custome.  
 As that an Infant of 15 yeares age, may alien. For  
 at this age he may consent to marriage, there-  
 fore in as great reason may he alien his lands; &  
 in some places any Infant of 9 yeares may binde  
 himselfe apprentice, which is a good custome  
 and standeth with reason. But some customes  
 there are that be not good. As that the tennants  
 shall not drive their beasts into the Common  
 before the Lord hath put in his. So if the lessor  
 will prescribe to surrender at his will, 7.H.6.  
 otherwise it is of the custome in the 14. H.4.  
 that the Tenant shall not alien without the  
 presentment of the same before, this is a good  
 custome

custome, and yet against common reason, but if it hath any taste or smatch of reason, it shall be allowed. As if the Lord prescribe that the tenant shall not common with any beasts, but those which were bred on the same land. this is good, for this will cause the tennant to breed Cattell; likewise that a *feme sole Merchant* shall sue without her husband, this is good, and yet against Common law, and reason, because the husband hereby is discharged of all such businesse: therefore if a custome have any part of reason, it shall be allowed. As 8. E. 3. that a man may make an estate to his wife during her life, and that should bee as good as an endowment *ad ostium ecclesie*. So it is of the custome of the Isle of man, that to steale a Capon, or a Pigge, shalbee Felony, and not to steale a Horse, or Cow, for that the one may bee hid, the other may not. Likewise is it, that the youngest sonne shall inherit, because he is lesse able to helpe himselfe. So is it of the custome of Kent, The Father to the bough, the sonne to the plow, and yet directly against the Common law. So I thinke of the case of Hogs put by Mr. Wray, for that in the time of pestilence it is dangerous to let them come into Cities.

This City is the greatest City, and most populous in this Realme, and the more populous the more honourable, & the more buildings, the more populous and honourable will it be. And

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therefore Buildings is to be favoured. And by this building all his light is not stopped, but parcell. And Mr. *Hales* thereby loseth no nor any great commodity, but is restrained of a little pleasure, for which he cannot maintaine his action.

To the act of Parliament I will speake nothing, but this I will say, that if any custome be merely voyd of reason, it is not good. As the custome in 5. H. 7. that if the Lord distraigne the beasts of his tenants for rent, that hee may detaine them untill hee bee satisfied at his pleasure ; and 21. H. 7. that if any doe breakethe Pound he shall pay 3 l. this is a voyd, and unreasonable custome to binde an estranger, and yet by common consent of the Lord, and tenhants, it is good to binde the tennants.

So if I prescribe, that if any mans Sheepe goe on my ground all the day, to have the foldage of them in the night, is a good custome, because by common entendment the owner hath *quid pro quo*. So our custome is for the maintenance of the City, neither is it against the common law directly, neither hereby any offence, or hurt is done unto Mr. *Hales*, for his house is not thereby impayred. And therefore, I thinke his action will not lye.

*Einis de ceux Arguments.*

R ESQ.

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# Resolutions of the *Judges of Assises,*

1633.

1. *Question.*



Whether the Church-wardens and Over-seers of the poore of a parish with assent of two Justices of the Peace, one beeing of the Quorum, may by the Statute of 43. Elizabeth, cap. 2 or any law enforce a Parishioner of the same Parish to take a child of a poore parishioner of the same Parish, who is not able to keepe his sayd childe, to bec an apprentice?

*Resol.* The Statute of 43. of Elizabeth, which sayth, that the Church-wardens and Over-seers of the parish shall put out Children to bee apprentices, necessarily imployeth, that such as are fit must receive Apprentices, and the putting out of poore children to bee apprentices is one

of the best wayes for the providing for the poore.

2. Q. If they may, then whether they must not give money with him, and who shall determine what money shall be given with him, if the party that is to take such an apprentice, and the Church-wardens, and Overseers cannot agree thereupon?

*Resol.* There is no necessity that money must bee given, but that must bee left to the discretion of the Church-wardens, and Overseers, all circumstances of age and ability, being considered, and if they cannot agree with the party, then the Justices of Peace neere adjoyning, or in their default the Sessions of peace are to determine these Controversies.

3. Q. Whether a Knight, Gentleman, Clergy-man, or Yeoman, or one that is Sojourner, using husbandry, cloathing, or grazing, or the like, may be enforced to take such an apprentice?

*Resol.* Every man who is by calling or profession or manner of living, that entertaineth, and must have the use of other servants of the like quality, must entertaine such apprentices, wherein discretion must be given upon due consideration of circumstances.

4. Q. Whether a wealthy man keeping few or no servants, nor wanting a servant, but li-

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ving privately may bee enforced to take such an apprentice; if not, then whether he may be taxed towards the putting forth of such an apprentice?

*Resol.* For the receiving of such apprentices, the answer may bee referred to the question next before ; but out of doubt every such person must contribute to the charge, as to other charges for the provision for the poore.

5. Q. Whether they may enforce a parishioner that is of one parish, to take such a child, apprentice, that is of another parish, but within the same County or division, if the proper parish be not able to provide for the children of the same parish ?

*Resol.* The Justices may provide Masters for them in other parishes within the same hundred, if the same hundred be not able, then out of that hundred in the rest of that County; As for other provision for the poore, which must bee at a quarter Sessions.

6. Q. If such a Parishioner may be enforced to take such an apprentice, and shall refuse not onely to take such an apprentice, but also refuse to be bound to appeare at the next quarter Sessions, or Assizes, what shall be done to him ?

*Resol.* If any refuse ; let such a one be bound over to the next Sessions or Assizes ; if hee refuse to give such bond, let him bee sent to

the Gaole, thereto remaine untill hee will give such bond.

7. Q. If such a Parishioner who refuseth to take such an apprentice shall bee bound over to the Sessions for not taking such an apprentice, and when he appeareth there, shall likewise refuse, what shall be done to him, and what shall bee done to the Parents who refuse to suffer their Children to be put out to bee apprentices, themselves not being able to maintaine them?

*Resol.* If at the Sessions or Assizes such a one refuseth to take an apprentice, and his excuse be not allowed, it is fit he bee bound to the good behaviour, and it will be a good course to indict such a refuser for a contempt, and thereupon to fine and imprison him, if he refuse to be bound to the good behaviour, let him bee imprisoned untill hee will; and the Kings booke of orders directeth that such be bound with good surties to appeare at the Councell board; and if the Parents of such poore children refuse to suffer their children to be bound apprentices, or being bound entice them away, themselves not being able to maintaine them, let them be committed to the house of correction.

8. Q. Whether it bee in the power of any generall quarter Sessions to mitigate any penalty upon a Statute law; if the party indicted shall submit himselfe to the fine of the Court, and wave the traverse?

*Resol.*

*Resol.* If the party bee convicted or confess the fault, it is not in the power of the Court to mitigate the fine, in such cases where the Statute makes it certaine : but if the party indicted protesting his Innocency, yet *quia noluit pli-  
zare cum domino Rege* puts himselfe up into the grace of the Court, the Court may impose a moderate fine, and order to forbear the prosecution.

9. Qu. If any be bound to appeare at the Sessions, and shall tender submission to the Court, whether the Sessions may stae the indictment, and mitigate the fine, aforesayd upon the confession of the fact ?

*Resol.* This is answered before to the next precedent Article.

10. Q. If a man be convicted for being drunk, tipling, and keeping an unlicensed Alehouse, or being licensed, for suffering others to remaine tipling in his house, or for swearing or driving Cattell upon a Sunday contrary to the Statute in that case provided ; whether the Justice of Peace, before whom hee was convicted, or any other Justice of the Peace may discharge him of all or part of the Forfeiture or punishment appointed by the Statute ?

*Resol.* The Justices have no such power of mitigation after conviction, where the Statute appoynts the measure of the punishment.

LL.Q.

11. Qu. Whether a Constable may upon a Warrant for carrying one to the house of correction for keeping an unlicenced Alehouse upon the second conviction breake open the house wherein the party convicted is, to apprehend him?

*Resol.* This question is to bee advised upon, it is put in generall termes and referred to bee considered in the particular where it appeareth.

12. Qu. If a woman unmarried bee hired from weeke to weeke, or from halfe yeare to halfe yeare, in one Parish, and there bee gotten with child, and then goeth from thence unto another parish, where she is settled in service by the space of two or three months, and then discovered that she is with childe: The question is, whether she shall bee settled in the Parish where she was begotten with child, or in the Parish where shee was last settled?

*Resol.* The place where such a woman was lawfully settled, is the direction in this case, not where she was begotten with child.

13. Qu. If a woman servant unmarried bee begotten with child, and then goeth out of her Mistris service, before or after it is discovered that she is with child, and the reputed father bee runne away, or is not able to free the Parish: whether the Master may bee enforced to provide for her till shee bee delivered, and for a moneth after?

*Resol.*

*Resol.* If the Master hath legally discharged his house of such a servant, hee is no more bound to provide for her than any other.

14. Qu. In case a Parish consist part of ancient Demeasne, and part of Guildable, an Affize is made for the relief of the maimed Souldiers, the Gaole, &c, according to the Statute of 24. Elizabeth, cap. 2. whether the tennants in ancient demesne shall contribute with the Guildable for the payment of the Affize?

*Resol.* The Statute doth not distinguish betweene the ancient Demeasne and the Guildable in these cases, *ubi lex non distinguitur, ibi nos non distinguimus.*

15. Q. Whether an Indictment of forceable detainer bee within the Statute of 1. Iacobi, cap. 5, and not to bee removed by Certiorari, unless the party Indicted first finde fureties according to that Statute, and whether the party Indicted bee to be bound in his absence to prosecute according to that Statute, and whether an Indictment of forcible entry &c. found at al private Sessions bee to bee removed by Certiorari without sureties, according to that Statute?

*Resol.* This is fittest to be left unto the Courte of Kings-bench, to whose Commission, and jurisdiction this is most proper.

16. Q. If one bee convicted upon the Statute of 3. Car. R. cap. 13. for driving of Cattell

on the Sunday through severall parishes; whether hee shall forfeit 20 s. to evey of the sayd parishes; or onely to one; if to one, then to which of them?

*Resol.* This Statute giveth the Forfeiture but of one 20.s. for one Sabbath day. Although the driving of that day bee through divers parishes. Therefore where the action is first attached, and the distresse first taken, that parish shall have the benefit of the Forfeiture, and not the other.

17. Qu. If one who is under the age of 30. yeeres, and brought up in husbandry, or a mayd-servant, or brought up in any of the Arts or trades mentioned in the Statute of 5. Elizab. c.4. and not enabled according to that Statute, to live at his or her owne hand, shall be warned by two lusters of the Peace to put him or her selfe in service by a day prescribed by them, and shall not doe the same accordingly, but shall after continue living at his or her owne hand, what course shall bee taken with such a person, and how punished?

*Resol.* Such persons being out of service, and not having visible meanes of their owne, to maintaine themselves without their labour, and refusing to serve as an hyred servant, by the yeere, may be bound over to the next Sessions or Assizes, and to bee of the good behaviour in the meane time; or may be sent to the house of correction.

18. Qu. Whether the taxe for the reliefe of the poore, upon the Statute of 43. Elizabeth, shall bee made by ability or occupation of lands, or both, and whether the visible ability in the parish where hee lives, or gene<sup>r</sup>all ability wheresoever, and whether his rent received, within the parish where hee lives shall bee accompted visible ability, and whether hee shall bee taxed of them onely and for any Rents received from other Parishioners; and what shall bee sayd visible ability?

*Resol.* The Land within each parish is to be taxed to the charges in the first place equally and indifferently, but there may bee an addition for the personall visible ability of the parishioner within that parish according to good discretion, wherein if there bee any mistaking, the Sessions, &c, or the Justice must judge betweene them.

19. Qu. Whether shops, salt-pits, sheds, profits of a Market, &c, be taxable to the poore as well as lands, Cole-mynes, &c. expressed in the Statute 43. Elizabeth?

*Resol.* All things which are reall, and a ycerely revenue, must be taxed to the poore.

20. Q. Whether the taxe for the County Stocke, Gaole, and house of Correction is to bee made by the Statute of 14. Elizabeth, cap. 43. Elizabeth: by ability, and upon the Inhabitants of the parish onoly, or upon

them, or the occupiers of Lands, dwelling in that parish: or whether such as occupie lands in that parish, and dwell in another parish shall bee taxed?

*Resol.* If the Statute in particular cases give no speciall direction, it is good discretion to go according to the rate of taxation for the poore: but when the Statutes themselves give directions, follow that.

21. Q. Whether any taxes ought to be made for the charges that petty Constables and Bor-shoulders are at in conveying rogues from parish to parish, and relieving of them, and how to be rated?

*Resol.* It is fit to relieve the Constable and Tything men, in such sort as it hath beeene used in the severall places where they live.

22. Qu. Whether a Justice of Peace may discharge a servant being with childe from her service, allowing that as a reasonable cause that she is thereby made unable to doe the service which otherwise she might have done, and if hee may discharge her, whether the Parish shall provide for her, till her delivery, if shee cannot provide for herselfe; and so also if her time be expired before her delivery, who shall provide for her after her time ended?

*Resol.* If a woman being with childe procure herselfe to bee retayned with a Master who knoweth nothing thereof, is a good cause to discharge her from his service. And if shee bee

begotten with childe during her service, it is al-  
one, but the Master in neither case must turne  
away such a servant of his owne authority. But  
if her terme be ended, or shee lawfully dischar-  
ged; the Master is not bound to provide for her,  
but it is a misfortune falle upon the parish, which  
they must beare, as in other cases of casuall im-  
potency.

23. Qu. Whether being delivered of a ba-  
stard childe in one parish, and goeth into ano-  
ther with her child; and becomes vagrant, and  
so is sent to the place of her birth: her bastard  
childe being under the age of seven yeeres, shall  
be settled with the mother, and there maintained  
if the mother bee not able, nor the reputed Fa-  
ther knowne, found: or whether it shall be sent  
to the place of its birth, or being settled with the  
mother, whether the Parish where it was borne,  
shall be ordered by the two next Justices to pay  
a weekly summe towards the mainetenance of  
it?

Resol. The Bastard child must be placed with  
the mother, so long as it is within the qualitie or  
condition of a Nurse childe, which shall be, till  
seven yeeres of age; and then it is fit to be sent  
to the place of its birth to be provided for, the  
mother or reputed father, not being able. And  
the Parish where the childe is borne shall not be  
forced to contribute to the charge, as long as the  
Mother lives, and the child be under seven yeere  
old.

24. Qu. A man with his wife and children takes an house in one parish, for a yeere: and before the end of his terme is unlawfully put out of possession, and after taketh part of an house, as an Inmate in another parish, from whence hee is also put out, and then not being able to get any dwelling, they come to lye in a Barne in a third parish where the husband falleth sicke, and the Wife is delivered of another childe, where ought these to be settled?

*Resol.* If a man or woman having house or habitation in one parish bee thrust out, this is an illegall unsetling which the Law forbiddeth, for none must bee enforced to turne vagrant, and such one must bee returned to the place where hee or shee was last lawfully settled, and the Childe also borne in the time of this distracti-  
on.

25. Qu. Whether an apprentice put out by the Churchwardens, &c. according to the Statute to a Master in another parish, if his Master dye and leave no Executor or Administrator fit to keepe an apprentice or able to place him; Hee shall bee provided for in the parish where hee was apprentice or shall bee sent backe to the parish from whence hee was put out?

*Resol.* Servants and apprentices are by law setled in that parish, and if they become impo-  
tent there, the parish must abide the adven-  
ture,

use after their terme or time of service be lawfully ended.

26. Qu. What is accompted a lawfull setting in a parish, and what not?

*Resol.* This is too generall a question to receive a perfect answer to every particular case which may happen: but generally this is to be observed, that the law unsetleth none who are lawfully settled; nor, permits it to bee done by practice, or compulsion, and every one who is settled is a native householder, sojourner, an apprentice or servant for a month at the least, without a just complaint made to remove him or her, shall be held to be settled.

27. Qu. A rogue is taken at C. and will not confess the place of his birth: neyther doth it appeare otherwise but that he confesseth the last place of his habitation to be at S. hereupon he is whipped and sent to S. at his coming to S. the place of his birth is there knowne by some to be at W. and therupon the rogue confesseth it to be so: whether hee might without any new vagrantie be sent to W?

*Resol.* In this case it is fit to send such a rogue to the place of his birth: for this is but a mistaking and no legal setting.

28. Qu. If an Indictment be preferred to the grand Jury of the quarter Sessions of the peace against one for murther, manslaughter, for robbery, or Petilareny, and ignoramus found therupon, whether the said Sessions may deliver the party by Proclamation or not? *Resol.*

*Resol.* Not by Proclamation at all, but for petty Lacenyes, and other petty F felonies; in discretion the Goale may bee delivered of them.

29. Qu. If a Constable be chosen and refuseth to take his Oath, what shall bee done, and whether a Constable may make a deputy, and by what meanes?

*Resol.* The refusall or neglect to take oath in such a case is a contempt worthy of punishment, and thereupon to fine, and imprison him, and the making of a deputy is rather by toleration, then by law.

30. Qu. If a Constable dye or remoove out of the Parish where, &c. how is his place to be supplied?

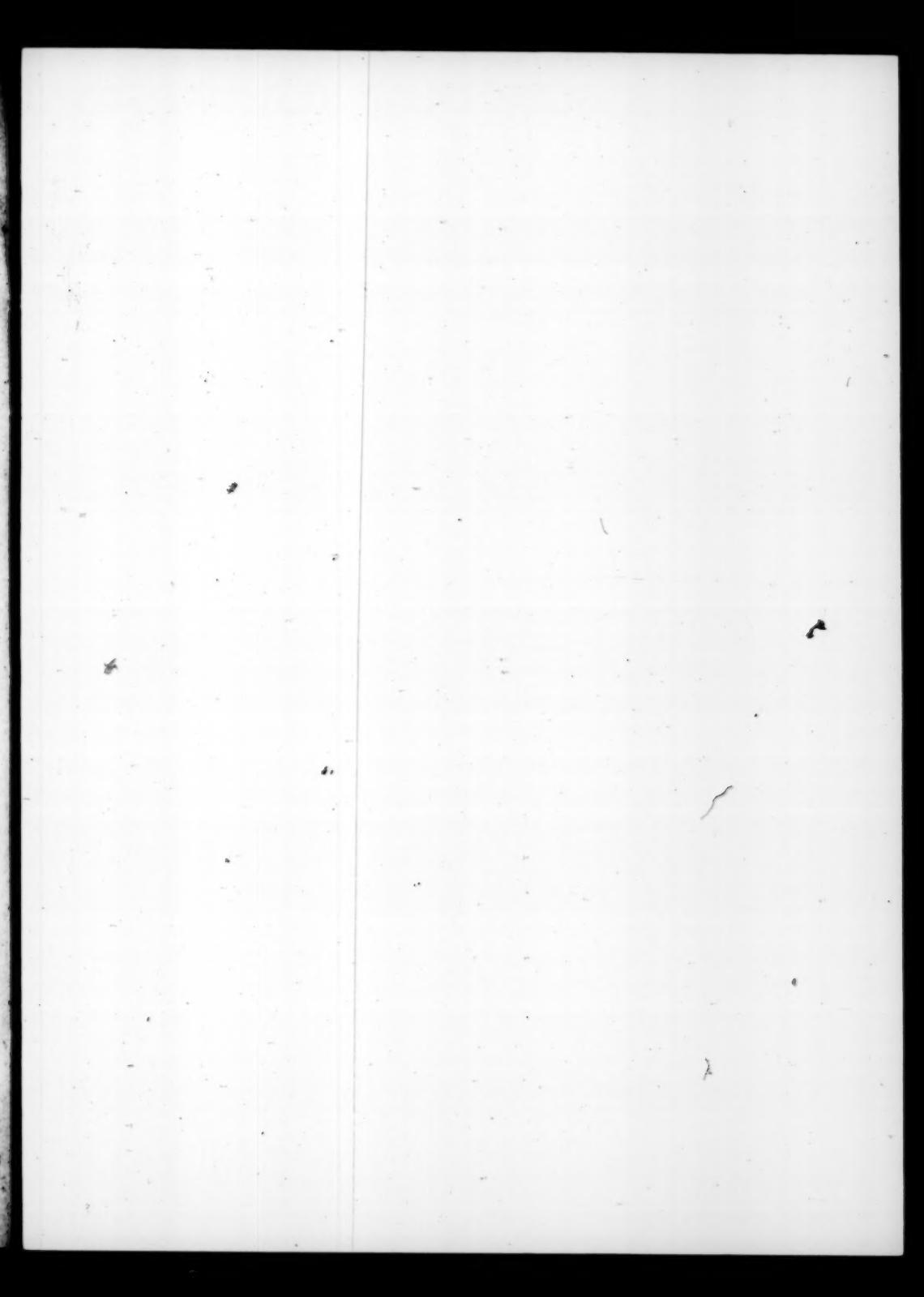
*Resol.* By the Lord of the Leete, if that time fall neare, otherwise by the Sessions; but if that bee too farre off, then by the next Justices.

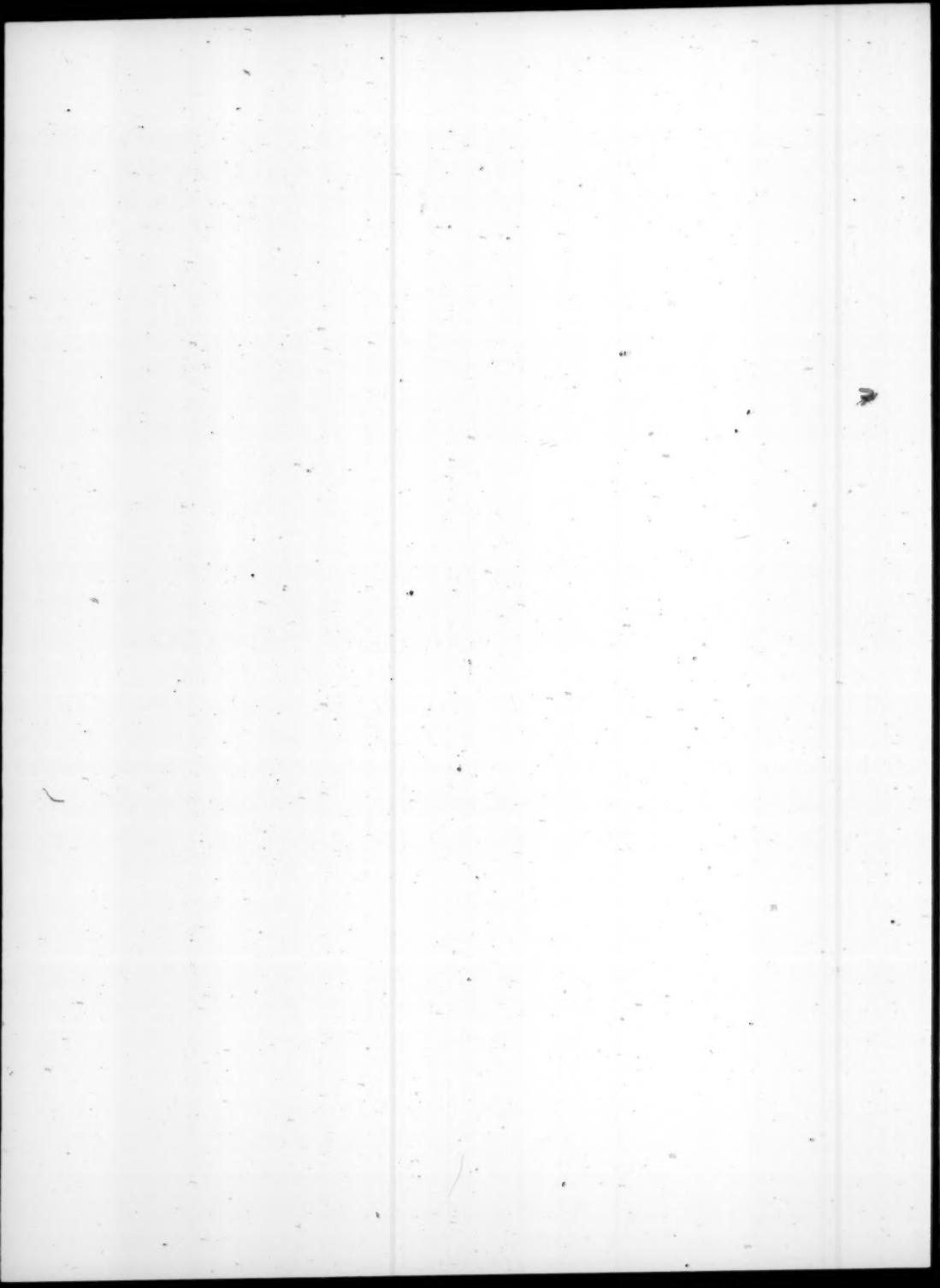
31. Qu. If a poore weake man be chosen Constable or Tythingman, and be unfit for the place how may he be remooved, and a fit man sworne in his roome?

*Resol.* The Justices of Peace must helpe this, and if the Lord of the Leete have power to choose a Constable or Tything-man and performe so ill, it is a just cause to seize his liberty.

32. Qu. If a Nurse-childe, a Scholler at a Grammar-schoole, or in the Vniversity prove

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to be impotēt by Sicknesse, lamenesse, lunacy, or discouery of Ideocy, &c. how such persons shall be disposed?

*Resol.* A Nurse-child, or a Scholler at the Grammar-schoole, or at the University, or persons sent to the Common gaole, Hospitall, or houses of Correction, are not to be esteemed as persons to be settled there, more then Travailers in their Innes, but their settling is where their Parents are settled; and Children borne in common Gaoles, and Houses of correction, their parents being prisoners, are to be maintained at the charge of the County.

33. Qu. What proportion Parsonages, or Tithes shall beare to the taxation of the poore of the Parish?

*Resol.* The Parson or Vicar presentative, shall according to the reasonable value of his Parsonage, having consideration to the just deductions.

34. Qu. Whether for placing the poore of the parish, not to be removed by consent of the parish, these poore men may not bee placed as Inmates for a time?

*Resol.* They may by expresse words of the Statute of the 43. of Elizabeth.

35. Qu. If a parishioner or owner within a parish do bring into the parish without the consent of the parish, a stranger of another parish, which is, or apparantly is like to bee burthensome unto the parish, how they may ease them-

*Resol.* By taxing such a one to the charge of the rates of the poore, not onely having respect to his ability or the land he occupies, but according to the damage and danger he bringeth to the parish by his folly.

36. Qu. For warding in the day-time, for apprehending of Rogues, whether the Constable may not enlarge it to a farther time?

*Resol.* Warding in the day-time is of great use, and must bee left to the discretion of the Constables or direction of the Iustices to vary according to the occasion.

37. Qu. Whether Alehouses ought to be allowed only in thorow-fare Townes, and others in other places to be restrained onely to sell to the poore out of doores.

*Resol.* The Iustices shall doe very well to allow none but in places very fit for their scituatiōn and uses, and to moderate the number.

38. Qu. A man for his quality otherwise fit to be a Constable, or of other Office of that nature, procures himselfe to be the Kings servant extraordinary, and by that meanes would excuse himselfe to serve in the Country?

*Resol.* A servant extraordinary may well performe his ordinary service in the Country according to his quality.



*The Justices opinion touching the Commissions by  
which the Justices sit at Newgate.*



THE Justices at Newgate sit by  
virtue of two Commissions (*viz.*)  
Gaole delivery, and Oyer and de-  
terminer.

By the Commission of Gaole  
delivery they may try all prisoners in the Gaole  
or by Bayle, or such as be indicted will render  
themselves, generally for all Felonies : and al-  
so for such other offences as are particularly as-  
signed to them by Statute.

The Statute of 4 Elizabeth, 3 cap. 2. doth  
give them power to receive Indictments a-  
gainst Prisoners or such as are upon bayle, and  
to proceede to try the same (*viz.*) Indictments  
taken before the Justices of the peace, and  
by equity thereofall Indictments before coro-  
ners, 3. Mar. Bro. Commission. omnium. 24. faith,  
That the Commission is ad deliberand. Gaol. de-  
prison. in eisdem existent. But they cannot take  
Indictments as Justices of Gaole delivery, but  
being Justices of the peace, they may take In-  
dictments against prisoners, but not against  
them that bee at large, forasmuch as power

Anciently fe-  
lonies inclu-  
ded all tres-  
passes, there-  
fore the Justi-  
ces of Gaole  
delivery have  
power to hold  
plea of tres-  
passes against  
them in pri-  
son or upon  
bayle to ren-  
der them-  
selves.

v. i. Mar. Dyr.  
99. Justices of  
Gaole delive-  
ry hold pleas  
of all appeals  
of felony or  
murder a-  
gainst one in  
prison by their  
general Com.  
and of ap-  
peals: so by  
the same rea-  
son to take  
Indictments.

is given them, consequently they must have meanes to doe so, which is by Indictments, *Id quærēd.*

Howsoever it is cleere, that they may enquire of many offences and take Indictments in such cases where power by the Statute is given to the Justices of Gaole delivery, in such cases where they have authority by Law or Statute there the title of Indictments is, that *Ad gaolam deliberaſionem tent.* before the Commissioners of Gaole delivery, *I.S.* was indicted, and the record must be made up so.

And whereas by the Statute of 4. *Eliz.* 3 cap. 2 Indictments taken before Justices of peace or Coroners, or any other against any Prisoners, then the entry of the Indictments is returned taken, *Memorand. quod ad generalem Sessionem tent.* before A. B.C. Justices *ad pacem in Com. Middlesex or London.* *I.S.* was indicted, and then tryed before Justices of Gaole delivery, and by vertue of the said Statute, Indictments taken before Justices of the Peace of London or Middlesex, are tryed before the Justices of Gaole delivery.

The Commissioners of Oyer and Terminer is *Ad triand. inquirend. audiend. & determinand.* They may enquire of all offences mentioned in the Commission, albeit the offenders bee at large, but they cannot try prisoners upon Indictments taken before any other then themselves, as the Justices of Gaole delivery may by the

the aforesayd Statute, unless there be a special Commission made, as it was in the case of the Earle of Leicester, mentioned in *Plow. Com.* for the ordinary Commission of Oyer, and terminer is *ad inquirend.*, *audiend.* & *determinand.*

3. Mar.

Bro. Com.

24.

therefore they cannot determine of things unless they make enquiry first, and on the other side also the Justices of Gaole delivery may try Indictments taken before Justices of the peace, yet if none indicted before Commissioners of Oyer and Terminer, the Justices of Gaole delivery cannot try the same, because the Record of the Commission of Oyer and Terminer are to be returned in the Kings Bench, 144. E. VI. 3. 31. to be returned to the said Justices of Gaole delivery.

The Commission and the Records of the proceedings before the Justices of Gaole delivery, are to be returned to the *Custos Rotulorum* of the County, when the same persons are Justices of Gaole delivery, and of Oyer and Terminer, they may sit the same day and place, and enquire by the same Iurie, but the entry of the Records must be severally according as the Indictment is.

At the Assizes in the Country, the Justices have their several power as the Justices of Gaole delivery, Oyer and Terminer, and Justices of peace, and aldermen, &c. &c. &c. But when the Records are made up, they must be according to the power they made, & so to proceed upon, & so to give judgment.

This is the regular and legal course. But the Clerkes of the Assizes promiscuously make entry thereof. But if a Writ of Error bee brought, they must certifie according to Law, or else it will be erroneous, and so upon a Certiorari.

The Sessions of London may bee begun at the Guild-hall, and then adjourned to Newgate, If some Indictments bee at Guild-hall, then those must bee so certified: if others at Newgate; then the adjournment must bee mentioned, and that the Indictment was then taken.

Note that the tryall of Indictments taken before Justices of the peace of London, cannot be tryed at Newgate, as in nature of a tryall before Justices of the peace at London, for many of the Commissioners, for Gaole delivery, are not Justices of the peace for London, but in such cases the tryall must be before the Justices of Gaole delivery: as upon Indictments taken before the Justices of the peace of London; as in the case of Indictments taken before the Justices of the peace of Middlesex.

to Butt If Indictments at Newgate be originally taken before them, as Justices of Gaole delivery, then it is inquirable how the Jury sworne, abdimpanned, to enquire at the Sessions of the Peace for London, or Middlesex, doe serve to present Indictments before the

the Justices of Gaole delivery at Newgate, un-  
lesse the custome and usage will warrant, the  
two severall Iuries, sworne at the Sessions of  
the peace for *London* or *Middlesex*, are also by  
the same oath and impanneling to serve for the  
grand Jury for the Commission of Gaole deli-  
very, and Oyer, and Terminer.

Vpon conference with Mr. *Keeling*, and  
the Clerkes for Newgate of *London*, and  
*Middlesex*, and the Clerkes of Assizes, and  
view of the severall Entries, a more mature  
and certaine resolution may bēe given, this  
being in haste, and without such considerati-  
ons as were requisite.

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*FfNIS.*

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*E.L.E.B.*